SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR APPELLANTS

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INDEX

	Page
Reply Brief for Appellants	1
Appendix A, Legislative History of Section 20a(2)	23
Appendix B, The *Alleghany* Case	26

CITATIONS

Cases:

Alleghany Corp. v. *Breswick & Co.*, 353 U.S. 151, 355 U.S. 415, 138 F. Supp. 123, 134 F. Supp. 132, 156 F. Supp. 227	9, 14-17, 26-31
Boudin v. *Dulles*, 235 F.2d 532 (D.C. Cir. 1956)	19
Chesapeake & O. Ry. Co. Purchase, 261 I.C.C. 239 (1945)	26
Coffey v. *Jordan*, 275 F.2d 1 (D.C. Cir. 1959)	18
Federal Trade Commission v. *Dean Foods Co.*, 384 U.S. 597	5
Jordan v. *American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1958)	19
Louisville & J. B. & R. Co. Merger, 290 I.C.C. 725 (1955)	26, 27
National Labor Relations Board v. *Capital Transit Co.*, 221 F.2d 864 (D.C. Cir. 1955)	19
Riss & Co. v. *United States*, 341 U.S. 907, reversing *per curiam*, 96 F. Supp. 452 (W.D. Mo. 1951)	18
Saginaw Broadcasting Co. v. *Federal Communications Comm'n*, 96 F.2d 554 (D.C. Cir. 1938)	19
Scenic Hudson Preservation Conference v. *Federal Power Comm'n*, 354 F.2d 608, *cert. den.*, 384 U.S. 941	4
Securities & Exchange Commission v. *Chenery Corp.*, 318 U.S. 80	19
Transportation Activities of Arrowhead Freight Lines, 61 M.C.C. 131 (1952)	2
Wong Yang Sung v. *McGrath*, 339 U.S. 33	18

Statutes:

Clayton Act: Page
Section 7 ..... *passim*
Section 11 ..... 5, 13, 14
Section 16 2

Interstate Commerce Act:
Section 5 ..... *passim*
Section 20a ..... *passim*
Administrative Procedure Act, Section 8(b) ... 18

Miscellaneous:

Railroad Securities Commission Report, H. Doc. 256, 62d Cong., 2d Sess. (1911) 10-11, 14
2 Davis, Administrative Law Treatise, § 16.05 (1958) 18

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It appears, in light of appellees' briefs, that no one disputes in this Court that the record establishes that the proposed REA-Greyhound transaction might very well violate section 7 of the Clayton Act and section 5 of the Interstate Commerce Act. Therefore, unless the terms "public interest" and "lawful object" in section 20a(2) are to be construed in a most restrictive, and wholly unprecedented, fashion, the Commission should not have approved the proposed securities issue under that statute without resolving the section 7 and section 5 questions. Perhaps legislative history or policy considerations could indisputably argue against imputing to the Congress the intent disclosed by the words of section 20a(2). But the burden of so demonstrating must surely, in the face of the

statutory language, be heavy indeed. The failure of appellees to meet that burden is, we think, clear on the basis of the considerations discussed in our opening brief. However, it might be useful for us to discuss in somewhat more explicit terms than we have thus far the practical considerations relevant to disposition of the legal issues raised on this appeal. In addition, we should like to add briefly to our analysis of some of those legal issues.

1. All parties call for harmonization of the various statutory provisions involved in this case—sections 20a and 5 of the Interstate Commerce Act and sections 7, 11, and 16 of the Clayton Act—in a situation where the Government concedes, and other appellees assume, that the basic issue is how the Commission should have acted on the section 20a application in the face of a record that established "serious questions on [the] score" of the "competitive consequences that might emerge from Greyhound's financial interest in REA" (Gov't Br. p. 19).[1]

As we read the Government's brief, its position respecting the propriety of approval of the securities issuance

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[1] To be sure, REA asserts that we have "conjured up" a definition of market on the basis of "ancient and specifically overruled case law and a statistical analysis which cries out for repudiation"—an analysis which is "fallacious in the extreme" and "not worth serious attention" (Br. 31). Despite this asserted deficiency in our analysis, however, REA assumes its correctness (Br. p. 32) and remits to an Appendix a demonstration of our error. Accordingly, we rest upon our main brief, the Government's concession, and REA's concession *arguendo*—particularly inasmuch as REA's Appendix does not demonstrate anything other than that REA conducts some business which is not express in a traditional sense—which we also pointed out in our opening brief (p. 32 n. 11)—and that Greyhound does not transport everything that REA does—*e.g.*, corpses, live animals, and baby chicks. We note only that the principle for which we cited *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131, 135 (1952)—that there are certain fundamental differences between express service and ordinary freight service—was *not* rejected by the reviewing court and was, as REA's own discussion indicates (p. 77 n. 21), reaffirmed by the Commission on remand, 63 M.C.C. 573. For a further indication that there is a "small shipments" market in which REA plays a major role, see the Government's brief at page 16.

without resolution of the section 7 Clayton Act or section 5 Interstate Commerce Act issues is based fundamentally upon two assumptions. The first is that, from the point of view of administrative economy, the Commission's action was desirable because it avoided the possibility of two successive hearings. The second is that no one will be adversely affected by the approval of the 20% acquisition, for a full complement of remedies, principally under section 5, will be available to appellants after expiration of the 60-day offer.

Neither of these assumptions is sustainable. The possibility of repetitive hearings seems remote, for it could materialize only if the Commission were to conclude after the initial hearing that the 20% transaction would violate neither section 7 nor section 5, and if Greyhound thereafter were to acquire a large block of stock pursuant to the 60-day offer. If on the initial hearing the Commission were to find that the 20% transaction would constitute an acquisition of control within section 5, then it could approve or disapprove and that would be the end of the matter. If it found no control but did find a violation of section 7, that would also be the end of the matter since the 60-day offer would never become effective. And if the Commission found neither a section 7 nor a section 5 violation and Greyhound were not to acquire much more stock—as REA says is the likeliest possibility (Br. p. 37)—there would be no occasion for a further proceeding.

Moreover, it is not easy to see why a second hearing, if it had to be held, would be a particularly onerous burden upon the Commission or the parties. At the initial hearing, presumably all of the problems respecting the character of the market and the market positions of REA and Greyhound, as well as all evidence relating to their purpose in entering into the stock transaction, would be explored. What would be left for a second hearing would in all

probability involve merely the question of the extent of Greyhound's stock interest in REA and whatever natural inferences can be made on the basis of that interest.

Finally, in any event, as we have pointed out (Br. pp. 49-50), any possibility of administrative inconvenience could have been eliminated if the Commission had denied section 20a approval on the ground that the "public interest" and "lawful object" findings could not be made on the basis of the existing record, leaving open to REA the right to reapply if the contract were reformed so that the 60-day offer would expire prior to action by the Commission under section 20a. On this point, the Government has not responded.[2]

Nor is it true that, as a practical matter, the Commission's action cannot harm appellants or others who might be affected by the REA-Greyhound relationship. It is, of course, difficult to predict precisely what might happen in the wake of the various possible results of the 60-day offer. We have already discussed the principles involved, and some of the practical possibilities, in our opening brief

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[2] REA does respond, but in the main says simply that if the Commission adopted this approach the contract would have to be renegotiated and this would give dissident stockholders another chance to thwart the transaction (Br. 32-33). Given the distinctly minority position of those stockholders, it is hard to perceive how this could be a danger. REA suggests no business purpose that would be frustrated by having the 60-day offer expire—in the sense that offers to sell would have to be made and rights of first purchase exercised, subject to ultimate Commission approval—prior to the Commission's action on the section 20a application.

REA adds, correctly, that appellants never suggested this approach to the Commission. But this is hardly surprising, since, in view of the Commission's refusal to hold a hearing, the only pleadings appellants had a chance to file were petitions for intervention and petitions for rehearing. Moreover, a section 20a proceeding is not simply a contest between private adversaries. In a section 20a proceeding, the Commission is charged with the responsibility of protecting the public interest; and in such circumstances "the right of the public must receive active and affirmative protection at the hands of the Commission." *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. den.*, 384 U.S. 941.

(pp. 44-48). By way of further illustration, we consider at this point the developments that might occur on one possible set of facts: the failure of Greyhound to acquire any additional REA stock, coupled with the acquisition by minority stockholders of an additional 10% of REA stock.

In such circumstances, a section 7 violation would, as we have already indicated in some detail (*e.g.*, Br. pp. 47-48), be highly probable. However, a section 5 violation might be debatable. Accordingly, the Commission might reject a request that a section 5 proceeding be held, thereby eliminating the possibility of any of the forms of interlocutory relief—*e.g.*, placing the stock in a voting trust—outlined by the Government as available under section 5 (Br. p. 30). Perhaps appellants would ultimately secure a reversal of the Commission's refusal to conduct a section 5 proceeding. Perhaps appellants would not. If they did, perhaps the Commission would at that point grant interlocutory relief. Perhaps it would not. If it did not, it seems highly questionable that appellants could secure judicial review of that interlocutory determination.

If the Commission decided not to hold a section 5 proceeding, it might also decide not to hold a section 11 Clayton Act proceeding on the theory that the increased interests of the dissenting stockholders eliminated any section 7 problem. This would be incorrect; but, as we have indicated (Br. p. 49 n. 23), it seems unlikely that appellants could secure judicial review of that determination. If the Commission did decide to hold a section 11 proceeding but not a section 5 proceeding, it might not attempt to secure a court order providing interlocutory relief insulating REA from Greyhound's influence. If it did make such an attempt, the decision of this Court in *Federal Trade Commission* v. *Dean Foods, Co.*, 384 U.S. 597, might or might not be extended to include this type of

remedy, which is, after all, different from interim relief enjoining consummation of the stock acquisition.

Of course, if a section 5 proceeding were held, and if it were determined that Greyhound had acquired control of REA and that this control should be approved, then as a practical matter it would not be significant that there was probably a section 7 Clayton Act violation, as well as a section 5(4) violation, prior to Commission approval, whether or not the Commission required the establishment of a voting trust during this period. But, as we have indicated, no one can tell whether there would be a section 5 proceeding; if there is such a proceeding no one can tell whether the Commission would find that there had been an acquisition of control; and if it did find an acquisition of control no one can tell whether it would approve that control. In a situation where it appears that the result of such control would be almost a total monopoly of a particular line of commerce, surely the outcome would not be self-evident.

In short, the Commission's action will predictably spawn an extraordinarily complex body of litigation that would involve substantial risks to appellants and to any other parties who claimed injury because of the Greyhound-REA arrangement.[3]

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[3] REA appears to suggest that, even if true, this consideration is irrelevant, since if Greyhound had acquired the stock interest on the open market it could not be blocked under section 20a(2). This is, of course, perfectly true; but it is also perfectly immaterial. A remedy that, on the basis of all other relevant considerations, is available should not be foreclosed on the ground that had the facts been different it would not be available. Moreover, and even more significantly, a section 20a(2) proceeding is not simply, or even primarily, a contest among private parties. It is a proceeding in which the Commission is required to discharge its statutory obligation to secure the public interest. Private parties are permitted to participate, if they have a sufficient interest; and they may of course advance their private interests. But a major justification for their participation is to insure that the Commission is able to, and does, perform its appointed task.

But the danger is not only to appellants. Curiously enough, a serious danger to Greyhound as well as to REA and its stockholders emerges from the Government's contention that REA's need for the purchase money is practically dispositive. Of course, if REA were to be required to refund the money in the event of an ultimately adverse decision by the Commission under section 7 or section 5, the Government's contention would hardly be tenable. But, says the Government, this would not be the result, for "REA will retain these proceeds even if Greyhound is ultimately compelled to dispose of its interest in it" (Br. p. 32). The only theory upon which this supposition can be based is that Greyhound would be compelled to dispose of its REA stock on the open market. But what price could Greyhound expect to receive for the stock of a company with REA's history of unprofitability? Surely an agency or a court could hardly regard a forced sale under such circumstances as very attractive from an equitable point of view.

But the alternative—rescission—seems equally impracticable. For one thing, as we have indicated, repayment by REA of the $10,000,000 would undercut in an *ex post facto* fashion one of the alleged primary justifications for the Commission's going ahead without resolving questions under sections 7 and 5. But, for another, it is evident that the $10,000,000 would have already been used so that REA would be in no position to effect repayment. Perhaps in these circumstances Greyhound's stock could be placed in a voting trust until REA would be able to refund the $10,000,000; but this freezing of $10,000,000 of Greyhound's assets in a wholly unremunerative fashion for what would probably be a very long period of time would also not be very appealing, either to Greyhound or to REA.

In sum, the Government's evident belief that there would be no difficulty in unraveling the REA-Greyhound transac-

tion is unfounded. It may be that counsel for the Government, who appear committed to the retention by REA of the purchase money and imposition of the risk of an open market sale of the REA stock upon Greyhound, would be untroubled by this less than even-handed treatment of the two companies. But this is hardly a guarantee that the Commission or a court would feel the same way.

As against these difficulties that the approach adopted by the Commission may well involve, the approach urged by appellants—resolution of the section 7 and section 5 issues prior to approval of the securities issuance—would be much more sensible. The possibility of illegal competitive damage would be eliminated; if the Commission wishes it could require a simple reformation of the contract that would eliminate any possibility whatever of two hearings; and there would be no necessity of attempting to undo a consummated transaction. To be sure, there would be a risk of damage under this approach also—a risk to REA. If it were ultimately to be decided that there would be no violation of section 7, or if a section 5 proceeding were to be held and the Commission were to approve control by Greyhound of REA, REA during the period of the litigation would be deprived of the use of $10,000,000 that, had the outcome been known from the start, REA could have had much earlier. But the risk, if it falls anywhere, should properly fall upon the party seeking Commission approval of a transaction that, on its face, gives promise of violating the law the Commission is obliged to enforce.

This, we suggest, is the common sense of the matter. We now turn to the legal issues.

2. Both the Government and REA base their legal analysis upon the premise that the considerations embraced within the "public interest" and "lawful object" standards of section 20a(2) do not include either the question whether

a proposed transaction would violate section 7 of the Clayton Act, the question whether it would violate section 5 of the Interstate Commerce Act, or the question whether in broader terms it would result in an undesirable impact on competition. Evidently appellees believe that, unless section 20a(2) is read in such a restrictive fashion, the Commission's determination that the transaction would be in the "public interest" and for a "lawful object" could not reasonably be squared with the Commission's failure to decide section 7 and section 5 issues that are concededly serious. In support of their construction of section 20a(2), both appellees rely upon the legislative history of that provision, upon an asserted conflict between section 20a and section 5 if our construction of the former were to prevail, and upon this Court's decisions in *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 355 U.S. 415.

On this crucial issue of statutory construction, appellees depart from the opinion of the lower court, which believed that this Court in *Alleghany* "left open the question" of the scope of section 20a, and also that in an appropriate case the Commission might be obliged under that section to consider both section 7 and section 5 issues (R. 413-415). While the court erred, in our view, in its ultimate judgment, it was more nearly correct in its conception of the reach of section 20a, and in its appraisal of the *Alleghany* litigation, than appellees.

a. As to the legislative history of the provision, surely, in light of the statutory language, there is a heavy burden upon appellees to show that the Congress intended to exclude from Commission consideration probable Clayton Act and section 5 violations that in any normal sense *are* material to the "public interest" and to the "lawful object" of the proposed transaction. The legislative history relied upon by appellees does not meet this burden. It shows only

that the Congress was, as we have agreed, primarily concerned with the fiscal aspects of proposed securities transactions. It certainly does not show that the Congress intended that the Commission be *exclusively* concerned with that problem. If the Congress intended that the Commisson restrict its scrutiny of a proposed transaction in such fashion, the Congress surely selected strikingly inept language—"public interest" and "lawful object"—to express its intention.

Moreover, there is legislative history that affirmatively suggests that the Congress, in enacting section 20a, was concerned about the possible anticompetitive impact of securities issuances. We do not contend that this legislative history is by itself conclusive. But it does significantly undercut any contention that the Congress intended that the scope of section 20a be less than the scope indicated by the language of the statute.

We set forth in Appendix A a detailed discussion of this legislative history. In general, what it amounts to is this: The history of section 20a, which was passed in 1920, is comprised largely of the history of substantially identical bills that the House had enacted in 1910 and in 1914, and had considered in 1916. In 1910, while the House passed a bill containing a securities regulation provision, the Senate's version of the legislation prevailed. That version substituted for the securities issuance provision a provision that created a commission to investigate "questions pertaining to the issuance of stocks and bonds by railroad corporations." The commission's report, which was submitted in 1911, condemned the intercorporate stockholdings that existed among railroads as an impediment to competition unaccompanied by the advantages of economy that might accrue through outright merger, and urged that the Congress require disclosure of securities transactions among

carriers and affiliated holdings companies. When the 1914 bill was debated in the House, one of its supporters observed that the provision accomplished the "results which the Hadley Commission stated as desirable." And in observing that the Republicans supported the bill, Representative Esch, the author of the provision that eventually became section 20a six years later, noted President Taft's recommendation that railroads be forbidden directly or indirectly from acquiring "any interests of any kind in capital stock" of a competing carrier. Taken together, these elements of legislative history indicate that one of the aspects of securities issuances that concerned the Congress was the anticompetitive impact of intercorporate holdings.

b. Next, the Government suggests that, because of the role that the Congress has assigned to the Commission under section 5, this court should conclude that there is no overlap between that provision and section 20a(2) in terms of consideration by the Commission of the anti-competitive impact of a proposed transaction (Br. pp. 22-25). We agree, as we have indicated, that section 20a(2) was not enacted for the explicit purpose of enabling the Commission to deal with violations of the Clayton Act—section 11 was enacted for that purpose—nor with the anticompetitive impact of stock acquisitions in a more general sense in a "control" situation —section 5 was enacted for that purpose. But neither the language employed by the Congress in section 20a(2) nor the legislative history of that provision, as we have also indicated, suggests any conclusion other than that the Congress intended the Commission, when faced with a section 20a(2) application, to consider *all* aspects of the "public interest," which would certainly normally include possible violations of other statutes that the Commission is required to enforce, such as section 7 and section 5. Thus, for the Government's contention to have any force, the Govern-

ment would have to demonstrate that there is a genuine conflict between the purposes of section 20a(2) and of sections 5, 7, and 11.

The Government's effort to establish that there is such a conflict is without merit. First, the Government suggests that, if probable violations of sections 7 or 5 are considered in a section 20a(2) proceeding, there might be "a risk of unreasonably delaying the raising of funds that may, as in the case of REA, be urgently needed" (Br. p. 23). But, for the reasons outlined in the prior portion of this brief, the interests of the carriers are hardly served by permitting consummation of a transaction that might later have to be undone. Moreover, to test the merit of the Government's contention respecting conflict between section 5 and section 20a(2), consider what would happen in terms of section 5 alone if the proposed acquisition involved 60% of the REA stock instead of 20%. Certainly, whatever REA's need for funds, no one could suggest that, in the face of the plain language of subsections 5(2) and 5(4), the parties could consummate the transaction without a determination by the Commission, after the procedures specified by section 5, that the acquisition of control should be authorized. But if expedition in equity financing is not a necessary hallmark of a section 5 proceeding, why should it be of a section 20a proceeding that raises serious section 5 and section 7 questions?

The Government's other suggestion respecting the inconsistency between section 20a(2), as we construe it, and section 5 is based upon the consideration that section 20a(2) does not empower the Commission to immunize a transaction from the antitrust laws, whereas section 5 does. Accordingly, says the Government, "appellants' contention that the Commission is required to enforce Section 7 of the Clayton Act in a proceeding under Section 20a leads to the anomalous conclusion that a securities issue may have to be

disallowed even though it might be the first step in an acquisition of control that the Commission could, on proper findings, authorize under section 5 notwithstanding antitrust considerations'' (Br. pp. 24-25).

As this statement clearly implies, this ''anomaly'' could occur only where the transaction involved less than ''control,'' since otherwise a section 5 proceeding would obviously be held together with the section 20a(2) proceeding.[4] But if that be so, then the argument assumes the total inapplicability of section 7 to the land transportation industry, for otherwise there could hardly be anything ''anomalous'' about denying section 20a(2) approval on the ground that the transaction would violate section 7. Certainly there is no authority supporting this notion of the irrelevance of section 7 to transactions between carriers where section 5 is inapplicable, whether or not the intent of the acquiring carrier is that the transaction is ''the first step in an acquisition of control.'' [5] The plain language of section 11, which obliges the Commission to enforce section 7, establishes the want of merit of the Government's position.

If there is any anomaly, in short, it does not proceed from our construction of section 20a(2), but from the interrelationship between sections 7 and 11 of the Clayton Act and section 5 of the Interstate Commerce Act. It is plain from those provisions that the Commission must enforce section 7 against carriers and may not immunize carriers from that statute except in a ''control'' situation. It could

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[4] The Government no longer suggests, as it did in its Motion to Affirm (p. 12), that any violation of section 7 would necessarily involve a violation of section 5. For a detailed discussion of that question, see our Reply to Motions to Affirm, pp. 11-14.

[5] This is not to say that this factor—whether achievement of "control" appears reasonably predictable and whether in the Commission's view such "control" would be desirable—would not be relevant, together with questions such as whether a voting trust had been established as an interim arrangement, in determining whether there is in fact a violation of section 7.

be suggested that this is not very sensible, since the result is that the Commission may immunize where the stock acquisition is large enough to confer control but must enforce section 7 where the acquisition is not that substantial. But, we repeat, this result has nothing to do with whether the Commission must consider section 7 violations in a section 20a(2) proceeding, for in any event it must consider such violations in a section 11 proceeding. Moreover, it is certainly arguable that the result is not at all incongruous. The Congress may have believed that the benefits that may flow from an acquisition of control or a merger in terms of such matters as economy of operation—the benefits that may offset damage to competition—cannot be assured in a situation where the relationship between the two companies amounts to less than control of one by the other. *Cf.* Railroad Securities Commission Report, H. Doc. 256, 62d Cong., 2d Sess. (1911), pp. 20-21.

c. Finally, as to *Alleghany*, that decision is irrelevant even if appellees read it correctly. Appellees maintain that in *Alleghany* this Court held that the Commission was not obliged to consider a section 5 "control" question in the context of the section 20a(2) proceeding there involved. But such a view would be wholly compatible with our arguments in the case at bar because of the character of the "control" issue in *Alleghany* as it related to the securities issue.

The securities issue in question was simply an exchange by Alleghany of one type of its own preferred stock for another type that was outstanding. See *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 158. The "control" question was whether or not it should have secured Commission approval of its *prior* acquisition of stock in the New York Central. Thus, as the Commission pointed out in its Jurisdictional Statement (p. 2), the one really had nothing to do with the other. More particularly, the stock to be issued

with the Commission's approval was not to be employed as a means of acquiring control over the New York Central or over any other carrier. The burden of our argument in the case at bar is, not that every past misfeasance of an applicant need be considered in a section 20a(2) proceeding, but simply that, where it is asserted with good reason that the issuance of the very securities in question will result in "control" or in a violation of section 7 of the Clayton Act, the Commission cannot give section 20a(2) approval without considering the section 5 and section 7 issues. The facts in *Alleghany* bear no resemblance whatever to such a situation, and the opinion, however read, contains no suggestion that our view is incorrect.

To this point we have assumed that appellees are correct in asserting that, in its one sentence *per curiam* in *Alleghany*, this Court held that the question of Alleghany's prior acquisition of control of the New York Central was not relevant to Alleghany's later section 20a(2) application to exchange one type of its preferred stock for another. However, the fact of the matter is that appellees have not correctly read this Court's *per curiam*. In our view, in that decision the Court did not intend to construe section 20a(2) at all. Rather, it simply ruled that, as no party had contended in the previous litigation in this Court that the legality of Alleghany's control of the New York Central was relevant to the propriety of the securities issue under section 20a(2), that contention was not open after this Court's remand.

We realize that the question whether our interpretation of the *per curiam* is correct rather than appellees' cannot be decided by reference to the *per curiam* alone, which simply stated:

> "The judgment of the District Court is reversed and the case is remanded for consideration by that

> court of the only claim that was left open at this Court's prior disposition of this litigation, to wit, whether 'the preferred stock issue as approved by the [Interstate Commerce] Commission was in violation of the Interstate Commerce Act.' " 355 U.S. 415, 416.

Rather, as the opinion indicates, its meaning is to be discerned only by way of an analysis of the prior stages of the litigation, which are extremely complex. Since, for the reasons already set forth, *Alleghany* is irrelevant under any reading, we will not extend the body of this brief by a complete discussion of *Alleghany*. Rather, we attach hereto Appendix B in which such a discussion is set forth. At this point, we state only in a general fashion the basis for our view of *Alleghany*.

In its first opinion in *Alleghany*, 353 U.S. 151, the Court, after holding that the Commission had jurisdiction to regulate Alleghany (*and hence jurisdiction to pass upon the* securities issue), concluded by stating that the case had to be remanded "for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act." *Id.*, at 175. Appellees' reading of the subsequent *per curiam* rests upon the supposition that this "appellees' claim," which was left open for consideration, involved the question whether the legality of Alleghany's control of the New York Central was relevant to the propriety of the securities issue.

However, as the briefs in the first *Alleghany* case make clear (see App. B *infra*), the "appellees' claim" under section 20a(2) had nothing to do with "control" questions, but was simply a contention—set forth at some length on brief—that the securities issue was fiscally unsound. That, then, was the only issue left open by this Court under its

mandate; and by its *per curiam* reversal of the District Court's decision on remand this Court meant nothing more than that the District Court, in considering the question of "control," had exceeded the scope of the mandate. In short, the appellees in *Alleghany*, not having urged at the first hearing in this Court that, even if the Commission had jurisdiction to regulate Alleghany, it should not have approved the securities issue because Alleghany was illegally in control of the New York Central, could not prevail on that ground after remand.

3. The foregoing deals with the major contentions advanced by appellees. There remain several peripheral points.

a. Considerable stress is placed by appellees upon the Commission finding that REA "urgently needs" $10,000,000 "in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level," and that REA "is handicapped in borrowing . . . because of its unfavorable debt-equity ratio." We have already indicated why these considerations are not material either as a practical matter or as a matter of law. We add also that there is nothing in the record—and no Commission finding—establishing that Greyhound was the only source to whom REA could turn. Moreover, there is not any detailed showing in the record as to how badly REA needs the money. To be sure, REA told the Commission what it wanted to do in terms of new capital expenditures; but it made no particularized showing as to what degree it expected to be benefitted by the expenditures or harmed if it could not make them. We do not suggest that the conclusory statements of need and advantage submitted by REA were an insufficient basis for Commission approval of the *fiscal* aspects of the proposed transaction.

We do suggest that the data does not furnish a sound basis for suggesting that scrutiny of the prospective anticompetitive impact of the transaction should properly have been deferred on something akin to a "failing company" theory.

b. Appellee REA contends that the findings requirement of section 8(b) of the Administrative Procedure Act, 5 U.S.C. §1009(b), does not apply to section 20a proceeding because the latter section does not compel a hearing; it permits the Commission to conduct one "if it sees fit" (REA Br. p. 55). We have urged, however, that refusal to conduct a hearing in this case constituted an abuse of Commission discretion under section 20a (Br. 57), which the Government suggests was "probably" the case if the Commission was obliged, as we contend, to consider the section 7 Clayton Act and section 5 Interstate Commerce Act issues (Gov't Br. p. 17 n.8). If the Commission did abuse its discretion, it was "required by statute," 5 U.S.C. §1006, to hold a hearing, and section 8(b) applied. *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 50; *Riss & Co.* v. *United States,* 341 U.S. 907, reversing *per curiam,* 96 F. Supp. 452 (W.D. Mo. 1951).

Moreover, even if section 8(b) is not applicable, the Commission was still obliged adequately to articulate the reasons for its decision. In *Coffey* v. *Jordan,* 275 F.2d 1, 2 (D.C. Cir. 1959), the court ruled that even though the applicable statute contained no express requirement for findings,

> " 'the practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement.' 2 Davis, Administrative Law Treatise §16.05 (1958). See e.g., Securities and Exchange

Commission v. Chenery Corp., 1943, 318 U.S. 80, 63 S. Ct. 454, 87 L.Ed. 626; Boudin v. Dulles, 1956, 98 U.S. App. D.C. 305, 235 F.2d 532; National Labor Relations Board v. Capital Transit Co., 1955, 95 U.S. App. D.C. 310, 312-313, 221 F.2d 864, 867; Jordan v. American Eagle Fire Ins. Co., 1958, 83 U.S. App. D.C. 192, 198, 169 F.2d 281, 287 (dictum); Saginaw Broadcasting Co. v. Federal Communications Comm'n, 1938, 68 App. D.C. 282, 287, 96 F.2d 554, 559; . . ."

We reiterate that, whether under section 8(b) or under the *Chenery* doctrine, and putting aside the failure of the full Commission to state that it was adopting the order of Division 3, that order was infirm. The Government says not a word about this issue; REA contends that "Paragraphs 7 through 10 of the Commission's order recite quite clearly why such [section 7 and section 5] investigations would not be appropriate at this time" (Br. p. 27). The difficulty with this argument is that those paragraphs (R. 199-200) recite indiscriminately a large number of facts, many of which are totally irrelevant to any conceivable explanation of the Commission's action in refusing to consider section 7 and section 5 questions. Nor does the Division state that these paragraphs, or any other paragraphs, set forth the reason for its action.

c. We have assumed thus far in this reply brief that Division 3's order does not contain a finding respecting section 5. However, we reiterate our position that that order does contain such a finding. The Government has not responded directly to this question, and all that REA says is that we have subjected the order "to much abuse" and that the "Commission obviously was simply reciting the reasons why it was appropriate to reserve the question of control until after the tender offer" (Br. p. 28). But

the "reasons" given in the pertinent portion of the order (R. 200-201) were, so far as we can tell, simply that the 20% transaction would not result in control. As the Commission put it, after reciting the facts that indicated, in the Commission's view, the limited power that Greyhound would have, "control or power to control must be real and not based on conjecture or remote possibilities" (R. 200-201). If our reading is correct, then no one questions that the Commission applied an erroneous test of control. See particularly the Government's brief p. 23. Moreover, no rational basis has been suggested for the Commission's considering section 5 questions in the section 20a proceeding but not section 7 questions.

Conclusion

For the reasons set forth in this brief, as well as in our opening brief, the judgment below should not be sustained.

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